LOKE KEEN

v.

THE CHAIRMAN, RENT APPEAL BOARD, SEREMBAN & ANOR.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 5 OF 1983]
16 SEPTEMBER 1983

ADMINISTRATIVE LAW: *Certiorari - Recovery of premises under Control of Rent Act - Appeal Board took cognizance of ground not mentioned in memorandum of appeal - Jurisdiction to do so.*

This was a motion for an order of *certiorari* to quash the order of the Chairman, Rent Appeal Board Seremban. The applicant in this motion who was the landlord had succeeded in his application before the Rent Tribunal to recover the premises for development. The tenants appealed to the Appeal Board. However, before the memorandum of appeal was filed the landlord failed to deposit the compensation within ten days of the order granting recovery of premises, as required by s. 18(4)(a) of the Control of Rent Act 1966 (the Act). The Appeal Board took cognizance of this ground raised by the tenants although it was not in the memorandum of appeal. The applicant argues that the Appeal Board had no jurisdiction to consider the said ground.

Section 15(1) of Act, *inter alia*, provides that any decision made by the Appeal Board shall be final and shall not be questioned in any Court. The ouster clause purports to preclude the remedy of *certiorari*.

Held:

[1] The ouster clause would not bar revisionary power of *certiorari* when the inferior tribunal has acted without jurisdiction or has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity such as e.g. the breach of the rules of natural justice.

[2] An error of law (which does not go to jurisdiction) is not a ground that can have the effect of suspending the operation of such an ouster clause.

[3] The Appeal Board had not violated any rule of natural justice.

[4] In considering the ground of s. 18(4)(a) of the Act, the Appeal Board acted within jurisdiction.

[Motion diomissed.]

Obiter:

(a) The provisions of s. 18(4)(a) of the Act, having regard to the plain and ordinary meaning of the words employed therein appear mandatory. Adopting also the purposive method of construction, the need to comply with the provisions is mandatory.

(b) Only the Rent Tribunal and not the Chairman acting alone can grant an extension of time to make the deposit out of time. The order of the Appeal Board in allowing the appeal of the tenants is confirmed and the notice of motion is dismissed with costs.

Cases referred to:
Chan Siew Kim v. Woi Fung Sheng Tim Medical Store & Anor. [1978] 1 MLJ 144
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
Gan Hoy Chong v. Siow Kian Yuh & Anor. [1975] 1 MLJ 41

Legislation referred to:
Control of Rent Act 1966, ss. 12, 13(5), 15(1), 18, (4)(a), (c)
Evidence Act 1950, s. 114 illus(e)
Rules of the Supreme Court 1957, O. 59 r. 2

For the applicant - A.K.J. D'Cruz (Atma Singh Gill with him); M/s. Gill & Tang
For the 2nd respondents - Leow Shin Fong; M/s. Arifin & Leow

JUDGMENT

Peh Swee Chin J:

This is a motion for an order of *certiorari* for quashing the order of the Chairman, Appeal Board, Seremban under the Control of Rent Act 1966, (the Act), and made on 6 January 1983.

Section 15(1) of the Act, *inter alia*, provides that any decision made by the Appeal Board shall be final and shall not be questioned in any Court. The subsection thus contains both a finality clause, which prohibits any appeals, and an ouster clause which purports to preclude the remedy of *certiorari*. The ouster clause is found in the words, to quote, "... shall not be questioned in any Court."

These words are judicially considered by Abdoolcader J (as he then was) in *Chan Siew Kim v. Woi Fung Sheng Tim Medical Store & Anor.* [1978] 1 MLJ 144 as an ouster clause which bars *certiorari,* but not completely, to the extent that *certiorari* would still issue when there is a jurisdictional defect in the authority that makes the decision or when there is manifest fraud in the person procuring it. Such words, or rather similar words in the Industrial Relations Act 1967 *viz*. "... called in question in any Court of law" came up for consideration in the well-known Privy Council case of *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufactures Employees Union & Ors.* [1980] 2 MLJ 165 in which Lord Fraser of Tulleybelton, held that these words were wide enough to refer to *certiorari* and to preclude it, but they would not bar revisionary power of *certiorari* when the inferior tribunal in question has acted without jurisdiction, or also, (following the decision of House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147), where the inferior tribunal has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity such as, e.g., the breach of the rules of natural justice. Thus, it will be seen that Abdoolcader J's interpretation of the ouster clause in the words described above was upheld by the Privy Council except that the Privy Council in the *Fire Bricks* case (*supra*), extended the grounds somewhat in the manner indicated above, on which *certiorari* would still issue in the face of such an ouster clause. Such extension of the grounds would, however, still not make an error of law (which does not go to jurisdiction) a ground that can have the effect of suspending the operation of such an ouster clause.

It now becomes necessary for me to consider that, despite the ouster clause, whether any of those somewhat restricted grounds exists herein, which would free the power of *certiorari* from its legislative container. To do so, I would have to examine the material facts in this case.

The applicant in this motion is landlord of premises in question, and the 2nd respondents, tenants. I would refer to them hereafter as landlord and tenants respectively. The landlord had earlier filed an application for recovery of the said premises for the purpose of development under s. 18 of the Act. The landlord succeeded in this application before the Rent Tribunal for the District of Seremban. The tenants, being dissatisfied, appealed to the Appeal Board. Before the memorandum of appeal was filed, certain unexpected event took place which had adversely affected the result of the appeal which was subsequently allowed by the Appeal Board.

The event referred to was the failure of the landlord to deposit the usual compensation, within ten days of the order granting recovery of premises under s. 18(4)(c) of the Act. The order was made on 30 April 1980 and the deposit was made only on 13 May 1980. The tenants' solicitors had earlier written a letter dated 12 May 1980, (p. 0022 of the Record), to the Chairman of the Rent Tribunal, enquiring whether the deposit for the compensation as ordered had been made by the successful landlord. It appears that on the same day, the said Chairman had written to the landlord's solicitors, (p. 0023 of the Record), asking for the said compensation in the sum of RM5,760 to be deposited. It was then paid on 13 May 1980 and by letter dated 17 May 1980, (p. 0021 of the Record), the Chairman of the Rent Tribunal so informed the tenants' solicitors who again wrote on 23 May 1980, (p. 0020 of the Record), to the Chairman of the Rent Tribunal stating that the order made on 30 April 1980 granting recovery of possession was deemed to have lapsed because of the failure to comply with s. 18(4)(a) of the Act, in not having deposited the compensation within ten days on the part of the landlord. In the memorandum of appeal filed by the tenants, they gave notice that they would take a preliminary point at the hearing of the appeal that the order dated 30 April 1980 had lapsed for the reasons stated above.

Now, s. 18 of the Act refers, *inter alia*, to the making of or refusal to make, an order for recovery of possession of controlled premises and s. 18(4)(a) provides as follows, after the making of such an order:

> Where the Tribunal makes an order under this section the following provisions shall apply:
>
> (a) the landlord in whose favour the order is made shall within ten days of the making of the order deposit with the Tribunal the amount of compensation awarded under subsection (2) and if he fails to deposit the same the order shall, unless the Tribunal otherwise determines, be deemed to have lapsed and be void;

Looking at s. 18(4)(a) of the Act, the tenants would appear to have stumbled on at least what appears to be a formidable ground of appeal. Learned Counsel for the landlord, however, has argued that the ground was not mentioned in the notice of appeal filed by the tenants earlier and could not therefore be raised before the Appeal Board.

Now, in the light of the restricted grounds mentioned earlier which are available to cause *certiorari* to issue in the face of the ouster clause explained above, the Court must now scrutinise the proceedings before the Appeal Board. In the first place, there was no question of any fraud on the part of anybody concerned in the proceedings there. Next, did the Appeal Board do anything or fail to do anything of such a nature that its decision is a nullity, e.g. was there then any breach of any rules of natural justice? I do not think, and nobody before me, has argued that the Appeal Board had committed any breach of any rule of natural justice. It is settled however, that if the Appeal Board had acted without jurisdiction or in excess of jurisdiction, its decision would still be a nullity.

In view of the argument of learned Counsel set out above the Court would have to apply its mind to this argument from the point of view of jurisdiction. In other words, was it open to the Appeal Board to take congnizance of this ground of the tenants and decide on it as it in fact did?

Now, normally, a notice of appeal does not set out the grounds of appeal which are always formulated in the memorandum or petition of appeal. This ground based on s. 18(4)(a) of the Act, however, was in fact set out in the memorandum of appeal of the tenants although it is not at all clear but Counsel's complaint seems to me to be this, i.e., that the event giving rise to this ground had only occurred after the conclusion of the hearing by the Tribunal and after the filing of the tenants' notice of appeal, it could therefore not be raised before the Appeal Board. Assuming this to be so, the Court would have to consider whether the Appeal Board had the jurisdiction to deal with this ground. Analogically, this situation brings to mind those cases where there was a default in not filing in time, the memorandum of appeal after the filing of notice of appeal, when the appellate Court has dismissed those appeals in question on account of the said default. Thus in the case of *Gan Hoy Chong v. Siow Kian Yuh & Anor.* [1975] 1 MLJ 41 the memorandum of appeal was filed after due date for filing and the appellant applied for extension of time to file and serve it. The application was refused and the appeal then was thus dismissed, for failure to comply with O. 59 r. 2 of the previous Rules of the Supreme Court 1957. Nobody in the cited case had raised the question before the Court then as to whether the Court could take cognizance and decide on the default occurring as it did, after the filing of the notice of appeal, but such jurisdiction was readily assumed to be available by all parties concerned there. For comparison, while it was the breach of a rule (O. 59 r. 2 of the Rules of the Supreme Court 1957) made under a statute *viz.* the Rule Committee Ordinance 1955 in that case, the breach complained of, however, in the appeal before the Appeal Board was a breach of a provision, [s. 18(4)(a), of the Act], of a statute. Both breaches would relate directly to the order or judgment sought to be impugned before the appellate body. The true view for both appellate bodies in the cited case and the appeal before the Appeal Board concerned herein, in upholding the objection based on such a breach in each case appears to be that the appeals were not properly before them, a situation that would deprive both appellate bodies of the right, or to be more precise, and curiously enough, of jurisdiction to hear the appeals. I therefore hold that the Appeal Board was acting within its jurisdiction in allowing the tenants' appeal before it on the ground under s. 18(4)(a) of the Act, in other words the order of the Appeal Board was made within its jurisdiction.

Having decided in favour of the tenants on the ground of jurisdiction it would not be strictly necessary for this Court to examine further whether the Appeal Board was in error of law in applying s. 18(4)(a) of the Act against the landlord.

However, should the matter go further from here, it would be desirable if I also examine whether the Appeal Board was in error as regards the objection under s. 18(4)(a) of the Act as advanced by the tenants and which found favour with the Appeal Board.

In the first place, the provisions of s. 18(4)(a), having regard to the plain and ordinary meaning of the words employed therein, appear to be peremptory or mandatory and the word "shall" recurs throughout that paragraph. The paragraph is not inconsistent with, or repugnant to any other provision in the Act. Adopting also the purposive method of construction, this paragraph appears to have been designed with the object of weeding out landlords who are either not *bona fide* or who are financially incapable of implementing the development, which is considered to be of such public interest as to override the almost otherwise irremovable

status of a tenant of controlled premises. The need to comply with the provisions in the paragraph is therefore in my view important and the obligation to make the deposit within the time is therefore mandatory.

However, it was submitted that the deposit was made about three days after the due date or time; that the Chairman of the Tribunal had exercised his discretion to accept the late payment and s. 114(e) of the Evidence Act applied, in that judicial or official acts were deemed to have been regularly performed. On the other hand, it was submitted that the Chairman of the Tribunal after the expiry of time for making the said deposit, exceeded his powers by writing to the landlord to pay the money. The power to extend time vested in the Rent Tribunal and not in its Chairman alone.

I think s. 18(4)(a) confers expressly power on the Tribunal as distinct from its Chairman, to determine otherwise e.g. to grant extension of time to make the said deposit out of time. Tribunal means the Rent Tribunal established under s. 12 of the Act which provides for Chairman and two members to sit therein wherever the Tribunal sits and for the decision, when not unanimous, to be decided by a majority in the manner provided therein. Section 13(5) provides further that before the Rent Tribunal makes an order, all interested parties be given an opportunity of being heard. Reverting to s. 18(4)(a), it is the Rent Tribunal that determines about the extension of time and not its Chairman acting alone. Further the words, "to determine" therein shall be regarded as connoting a quasi-judicial act, and not a purely administrative act, in the sense of coming to a decision. A decision of this kind would obviously and significantly affect the tenants, making the compliance of that rule of natural justice of *audi alteram partem* inevitable. As the Tribunal had never sat, and if it had sat, the tenants had never been summoned thereto, the decision of the Chairman in accepting payment of the deposit out of time was untenable. The order of the Appeal Board in allowing the appeal of the tenants is therefore confirmed.

I would therefore dismiss the notice of motion with costs.

Also found at [1983] 2 CLJ 264